

Commentary: Exoneration of the mentally ill

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One can understand, perhaps, the impatience of the judge in a Scottish criminal trial who explained the insanity defence to the jury by saying, 'The question before you is: Is this man mad?' Such lack of concern with the complexities of the issue may irritate the philosopher, but it probably assists puzzled jurors. Moreover, it clearly expresses our popular intuitions: the courts do not like to punish the mentally ill, not necessarily because such offenders are incapable of understanding the implications of their acts but simply because they are, in ordinary parlance, insane.

It is this fundamental commitment to the non-punishment of the insane which has of recent come under critical scrutiny. The inspiration for at least some of these attacks is populist: those who are dubious as to the efficacy of rehabilitation-orientated criminal justice and who see political mileage in an attitude of penal toughness find an easy target in the mentally-disordered defendant. It is no coincidence that some of the most vociferous attacks on the insanity defence were launched in the United States after the attempted assassination of a then popular president. That the man or woman in the jury-box may share this view is demonstrated by the willingness of the jury to convict Peter Sutcliffe in the face of strong evidence of psychiatric illness (1).

A more subtle questioning of our attitudes to the exoneration of the mentally ill has come from theorists of criminal law who question the suppositions on which the so-called mental defences are based. The broad blanket approach of exonerating the mentally abnormal on the mere fact of illness is, with some degree of justification, now being questioned. The extreme end of this opposition argues for non-discrimination between normal and abnormal defendants, at least at the stage of determining guilt. In this view the paranoid schizophrenic deserves his conviction in the same way as the sane defendant, although it is conceded that the former, once convicted, may be treated in a less punitive way. Less extreme positions are adopted by those who see the full

insanity defence as too widely stated, or who feel that the diminished responsibility plea is illogical.

Where does Mr Fields stand in this debate? The two strands running through his initial analysis of the basis of exculpation are the classical grounds of excuse embodied in Aristotle's discussion of voluntariness as the foundation of responsibility – ignorance and compulsion. These two categories are currently garbed in the language of cognition and volition, but embody the same essential sentiment as did the traditional categories. Mr Fields attempts to dissect cognitive and volitional abnormalities to find out whether they reveal anything which we can identify as the real reason for regarding such conditions as exculpating. What he comes up with is a state described as that of not 'having a morally bad attitude'. Now, what does this mean? Is it anything new?

Mr Fields demonstrates quite satisfactorily that there are some actors who provide clear instances of persons without a morally bad attitude. The man who acts under external compulsion (which should be distinguished, be it noted, from duress), or the unconscious actor – the automaton, the somnambulist – are perhaps the strongest examples of people who do not have the attitude in question. By contrast, the man who, with no significant mental peculiarities, carries out a deliberate programme of fraud, theft or assault on hapless victims must be an obvious case of a person with a morally bad attitude in Mr Fields's terms. What makes them good and bad respectively? Mr Fields investigates this in his section, 'Application of the rationale to impaired conditions'.

The essence of the distinction, it would seem, is to be found in the concept of respect for autonomy. We are given the example of the hoodlum who assaults the passer-by – an attitude which shows lack of concern for the victim's autonomy – and the contrasting case of the paranoid who assaults the neighbour in respect of whom he harbours delusions. The latter action, it is suggested, does not demonstrate disrespect for the principle of autonomy and does not therefore reveal a morally bad attitude.

The concept of autonomy has a great deal of work to do in modern philosophical debate and it will be interesting to see whether it is capable of taking on the role that Mr Fields has suggested for it here. The idea

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is an intriguing one, but there are major difficulties that prevent its acceptance as a complete grounds for exculpation. To begin with, does it really entail saying anything more than 'X behaved badly because he infringed a moral principle by which to place great store'? The answer to this is no. It need hardly be stated, of course, that an adequate enquiry will take into account possible excuses for X's conduct. There may be objective justification, as in self-defence, and in such a case there is no wrong committed; in the absence of such objectively assessed justification, though, we must investigate the facts as seen by X in order to assess moral blameworthiness. If X thought that he was acting within his rights, then we might exculpate him (although the criminal law might in some cases decline to do so). If the paranoid schizophrenic thought that he was entitled to assault his neighbour in self-defence, then he is in the same position as any other actor who acts on a mistaken assumption that he was entitled to do what he did.

This analysis works in the neighbour-assaulting incident given by Mr Fields, but it only does so because his hypothetical paranoid is reasoning in a way which we understand. But what of the case of the mentally disordered offender who does not reason in any way which we can understand, or, if we do understand, which we cannot condone? He may attack his neighbour not as part of a plan of conduct in which notions of cause and effect play a role, but for no good reason at all. He might assault him purely because he suddenly feels dislike for him. In such a case, he shows none of the self-control expected of the normal person. Does this mean that he does not respect the neighbour's autonomy? The answer to this must be that he does not, and this raises the question as to what distinguishes him from the gratuitously aggressive, but not mentally abnormal person, one who assaults somebody to whom he has taken a dislike? Whatever this distinction is, it is not going to be found in the mere possession of attitudes on the part of either offender to the autonomy of others.

To understand the distinction, we surely have to ask what lies behind the different attitudes towards autonomy, and this enquiry takes us back to the very question which those concerned with these defences are constantly posing: What is it that makes the mentally abnormal offender so different? Once this question is confronted, we have no alternative but to examine the actions of these offenders in terms of understanding, ability to reason, control of impulses, and so on. In the absence of anything better, one might even end up with a test as unsatisfactory as the McNaughton Rules.

To say that what distinguishes the mentally abnormal offender from other offenders is the possession by the latter of a morally bad attitude is probably true, but it is also not a particularly helpful observation. We decide that the mentally abnormal offender does not have a morally bad attitude because of some quality he possesses, not because the attitude

he manifests is in itself not a bad one.

Diminished responsibility

The diminished responsibility plea is undoubtedly more open to criticism than the insanity defence itself. There is, of course, the sheer inconsistency of the fact that this defence is available only in homicide cases and in no others; but, in addition to that, there is the powerful objection, voiced by Kenny and by many others, to the effect that the defendant who relies on diminished responsibility is capable of conforming his conduct to the requirements of the law (2). Indeed this is true, and I would suggest that this point might well be made of the defendant pleading premenstrual tension (PMT) as a grounds for diminished responsibility. Of course such a person can stop herself from breaking the law, just as somebody suffering from, for example, the Othello Syndrome can stop himself from killing his partner or her suspected lover. The point, however, is that such people tend not to restrain themselves from such disastrous conduct, and the reason why they tend not to restrain themselves may well be found in the existence of a psychiatric condition. Need we enquire further, particularly as the fundamental issue of the ability of a particular person to control himself or herself is a matter which we are not going to be able to settle in any scientifically acceptable fashion? In spite of all the criticism, there is a strong argument for taking the view that certain mental conditions should be blanket-excusing conditions. It may well be that as a consequence of this we exculpate persons whose wrongful conduct had nothing to do in the causal sense with their mental abnormality, but is there anything practically unsatisfactory in this?

Let us assume that we are faced with a person suffering from a psychotic illness. This person may have been of avaricious disposition before the onset of the illness, and subsequent thefts might be explained by the character defect rather than the illness. If the illness is taken as an exculpating factor in such a case, responsibility is not being attributed in a case in which, strictly speaking, it might be just to attribute it. But if we punish such a person, we are punishing somebody who is ill, and that seems, quite simply, cruel. There is an antique adage of civilian jurisprudence which embodies this sentiment rather neatly: '*furius solo furore punitur*' (the insane person is punished only by his madness).

Criticism of this view will probably focus on the status aspect of such defences – the mere status of mental abnormality, it might be argued, should not constitute an excuse for wrongful behaviour. There is, however, a useful analogy in childhood here, an analogy that has been skilfully brought into the debate by Jennifer Radden in her recent analysis of the insanity defence (3). She suggests that the way in which we regard children as not responsible for their actions might be similar to the way in which we regard mentally abnormal people as exempt from culpability.

In each case there is egocentricity and a private orientation which may prevent the actor from relating to the world in the same way as does a mature, normal adult. Feinberg makes a similar point, although he does not pursue the childhood analogy (4). He points out that the mentally abnormal person will usually have a lack of insight into his own motives for action which will distinguish him from sane people around him. There may well be an ability to reason, just as there may be an ability to control actions; but reason may not be exerted and the capacity to control may remain unexercised. The PMT-sufferer may be able to control herself (for all we know), but may not do so because in her abnormal state she does not have insight into why she should do so.

There are other reasons why it is right to defend the diminished responsibility plea against the attacks of people like Mr Kenny. At present, this plea represents a useful means of tempering justice with mercy. It can be invoked, for example, by those charged with mercy killing, and, if it were not for the doctrine, such people would face charges of murder and the life imprisonment that goes with conviction on such charges. It can also be invoked by those defendants who attack and kill a bullying husband after years of misery, just as in such cases by judicial sleight of hand

the doctrine of cumulative provocation might come to the rescue. The availability of the plea might not, of course, be such an important matter if there were no fixed penalty for murder, but the abolition of the fixed penalty might be a politically difficult task. Even then, there is the consideration that the courts would be labelling as murderers those who might be killers but who are undeserving of the immense moral opprobrium attached to a conviction for murder.

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References

- (1) For discussion of the Sutcliffe trial, see Prins, H. *Dangerous behaviour, the law and mental disorder*. London: Tavistock, 1986: 33.
 - (2) For a powerful attack on the diminished responsibility plea, see Morse S J. Undiminished confusion in diminished capacity. *Journal of criminal law and criminology* 1984; 75: 1.
 - (3) Radden J. *Madness and reason*. London: Allen and Unwin, 1985: 139.
 - (4) Feinberg J. What is so special about mental illness? In: Feinberg J. *Doing and deserving*. Princeton: Princeton University Press, 1970: 272.
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